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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE CITY OF LOS ANGELES, Defendant and Appellant, v. ESTATE OF NORMA VIDES, et al., Plaintiffs and Respondents.	B170448 (Los Angeles County Super. Ct. No. BC207495)

APPEAL from an order of the Los Angeles Superior Court. Rodney E. Nelson, Judge. Reversed and remanded with directions.

Rockard J. Delgadillo, City Attorney, Blithe S. Bock, Deputy City Attorney, for Defendant and Appellant.

Moreno, Becerra, Guerrero & Casillas, Gregory W. Moreno, Danilo J. Becerra, Arnoldo Casillas and Christopher F. Moreno for Plaintiffs and Respondents.

In a personal injury action filed in 1999, the trial court awarded plaintiffs $10,000 in monetary sanctions, under Code of Civil Procedure section 128.5 (section 128.5),[1] after defendants' alleged violation of pre-trial evidentiary rulings necessitated a mistrial. We reverse. Section 128.5 does not govern conduct arising from claims initiated after December 31, 1994.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a March 1998 car accident. Minor Norma Vides (Vides) was one of several passengers in a car driven by Pedro Anaya (Anaya), which rear-ended a trash truck stopped in traffic. The truck was owned and operated by appellant City of Los Angeles (City). Vides, who was critically injured in the accident, was one of several passengers air-lifted from the scene by City-owned helicopter ambulances. The helicopter carrying Vides crashed on the way to the hospital, and she was killed. Vides' estate (Estate) sued the City for wrongful death, and Anaya and the other passengers and family members sued the City for personal injuries. The City filed a cross-complaint against Anaya and others. In due course, the Estate's wrongful death claim settled, leaving only the personal injury claims for trial. At trial, the plaintiff and respondent family members (collectively, respondents) were represented by attorneys Becerra, Casillas and Moreno.

On February 11, 2003, the trial court addressed the parties' pre trial motions. Among other motions, the City moved *in limine* to exclude evidence of the helicopter crash on the grounds it was irrelevant, immaterial to the personal injury action, and highly prejudicial. Respondents opposed that motion to the extent it sought to deny them the opportunity to argue Vides' death was due, in part, to the City's negligence, which impacted some family members' claims for emotional distress damages. After extensive colloquy between the court and all the parties' counsel, the City's motion to exclude all

[1] Unless noted otherwise, statutory references are to the Code of Civil Procedure.

references to the fact that the helicopter carrying Vides crashed was denied. The court stated it did not "really think it's relevant but no one will go to jail if somebody says one of the helicopters crash[ed]," and noted that the crash would almost certainly be mentioned as part of the events of that day.

The issue of Anaya's absence from trial was also raised during the pre-trial hearing. At the outset of the hearing, Robert Pulone, an attorney representing the City, noted that Anaya, a plaintiff and cross-defendant, was absent. Moreno told the trial court Anaya was "unavailable," out of the country, and had no assets or insurance coverage. The court said it could "put a judgment on him." At the conclusion of the hearing, Pulone inquired again how the court intended "to handle the default on Pedro Anaya," and asked whether the jury would be told he was in default and should be present. In response, the judge said "I can mention he is not going to be here, I suppose." Respondents' counsel agreed ("yes"), as did Pulone ("as long as the jury knows he's a party").

After the hearing, the City moved for reconsideration of the ruling on its *in limine* motion to exclude evidence of the helicopter crash. The City insisted the respondents wanted to introduce evidence of the helicopter crash only to explain the emotional distress suffered by Vides' siblings and cousins as a result of her death. The City argued the trial court erred in permitting respondents to mention the helicopter crash because the relatives did not witness the crash, and were not closely enough related to Vides to qualify for crash-related damages. Respondents opposed the motion for reconsideration, which the court took up on February 18, 2003. After extensive discussion between the court and counsel about the purpose, effect and admissibility of evidence related to the helicopter crash which killed Vides, the court granted the City's motion to exclude evidence of the helicopter crash. When asked by respondents' counsel if Vides' sisters could at least testify they never saw their sister again, the court said "Well, if they do I will instruct that there was a helicopter crash and those who had claims relating to it sued and got a big settlement." Respondents agreed to that instruction.

The presentation of opening statements began immediately after the hearing on the motion for the reconsideration. Despite the fact the trial court had just granted the City's request to exclude evidence of the helicopter crash, attorney Becerra's opening statement informed the jury that, as part of the evidence of the trauma suffered by the children, it was "also going to hear about Norma. And Norma is not a plaintiff in this case, but you're going to hear that Norma was in that back seat with the children. . . . That mom, which in [*sic*] this case . . . went off in a different helicopter, and one of the fears these children had was they'd never see Norma, and they never do see Norma again. They never do see her again." Later in the proceedings, the City complained Becerra's opening statement had violated the court's order regarding the exclusion of the evidence regarding the helicopter crash. In response, the court said it would tell the jury "that [Vides] was on a helicopter that crashed, but there cannot be recovery for that in this case."

During voir dire, the trial court twice informed potential jurors that Anaya, the driver of the car in which plaintiffs were passengers, was a party to the case but would not be present at trial.

At trial, respondent Genoveva Anaya, who was the owner of the car driven by her nephew Pedro Anaya and the mother or grandmother of the other respondents, was asked on direct examination why she had not attended trial proceedings up to that point. She testified that she was the sole provider for the family, worked double shifts and, if she missed work, she would lose her livelihood.

On cross-examination, Pulone revisited the issue of Genoveva Anaya's prior absence from trial. He asked her whether she had been absent because she had to work, whether she was the sole bread winner in her family, and whether she could lose her job and her livelihood. She responded "yes" to each question. Pulone then asked Genoveva Anaya if it was not "true that [she had] already collected one million dollars from the [City] in a settlement . . . in this matter." Becerra objected immediately, and the court and counsel discussed the matter at the sidebar. Respondents' counsel accused Pulone of attempting to inflame the jury and make them believe respondents had collected that money, and opined that a mistrial was the only appropriate remedy for Pulone's improper

behavior. Pulone defended his actions by saying Becerra had "opened the door" by "basically" telling the jurors in his opening statement that Vides was dead, and had attempted improperly to elicit the jurors' sympathy by asking Anaya about losing her job and her livelihood.

Pulone continued his cross-examination, asking Genoveva Anaya a number of questions about whether Pedro Anaya had a learner's permit, and whether she had seen it. He then asked Genoveva Anaya if she knew why Pedro Anaya was not at trial that day. Respondents' counsel objected to the question as irrelevant. Before the trial court could rule on the objection, Pulone noted Pedro Anaya was a party. The court then asked "[h]e is outside the County [*sic*], isn't he?" Pulone immediately blurted out that Anaya had been "deported." Attorney Casillas noted Pulone's comment was a "low blow." The court told the jury: "I don't know why he is outside the country, but he is outside the country at this time."

After the jury was excused, Becerra moved for a mistrial based on Pulone's "intentional and deliberate misconduct" with respect to "violating the court's order . . . about the helicopter crash and the settlement," an act he claimed had seriously impacted the plaintiffs, especially the minor plaintiffs, in terms of a realistic evaluation of damages. Secondly, Becerra argued that Pulone's gratuitous statement regarding the deportation of Pedro Anaya raised a "highly, highly prejudicial issue of an undocumented illegal alien," and prejudiced the plaintiffs' ability to get a fair trial. Pulone's act was particularly egregious because there was no question about the legality of Anaya's presence in the United States, a fact known to the City's attorneys who had deposed him. Moreover, because Pulone had not posed a question, but had "just thrown out" a statement, the damage caused by his misconduct could not be mitigated by a jury admonishment or instruction.

Pulone argued a mistrial was not warranted. He said only that Anaya had been deported which was true, not that he was an illegal alien. As for the statement regarding the helicopter crash and settlement, Pulone noted the trial court had indicated its intent to tell the jury about the crash, the death and the settlement. He assumed the court would

make it clear it was Vides' parents, not the children, who received a settlement, and had done no more than attach a monetary amount to the settlement. He insisted any misconduct could be addressed by an instruction informing the jury his statements were not evidence. The court found Pulone's remarks "could have a depressant effect on the jury awards," and granted a mistrial.

Several months later, respondents filed a motion under section 128.5, seeking monetary sanctions against the City for its counsel's violation of the court's ruling on the *in limine* motion, and for announcing to the jury that Pedro Anaya had been deported. That motion was granted, and the City was ordered to pay respondents $10,000 in sanctions. The City appeals.

DISCUSSION

The City insists the order granting sanctions must be reversed because the award is premised on an inapplicable statute. We agree.

1. The statute on which the trial court's sanctions order was based does not apply to proceedings commenced after 1994.

Absent statutory authority, trial courts generally are not free to impose monetary sanctions for misconduct. (*Olmstead v. Arthur J. Galagher & Co.* (2004) 32 Cal.4th 804, 809 (*Olmstead*); *Baugess v. Paine* (1978) 22 Cal.3d 626, 634-639; *People v. Muhammad* (2003) 108 Cal.App.4th 313, 316.)

Respondents' motion for sanctions was premised on section 128.5, the statute on which the trial court relied in making its award. That statute vests trial courts with the authority to "order a party . . . to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (§ 128.5, subd. (a).) Under section 128.5, "frivolous" actions and tactics are either "totally and completely without merit," or engaged in "for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) Bad-faith "actions or tactics" include the making or opposing of motions or the filing and service of a complaint, if the actions or tactics arise from a proceeding initiated on or

before December 31, 1994. (§ 128.5, subd. (b)(1).) The City insists the sanctions order was inappropriate because this case was filed in May 1999. It is correct.

In *Olmstead*, the Supreme Court granted review specifically to address the question of "whether 'section 128.5 authorizes sanctions for bad faith conduct or litigation abuses that occurred after December 31, 1994, or whether the imposition of sanctions for such conduct is governed solely by . . . section 128.7.'" (*Olmstead, supra*, 32 Cal.4th at pp. 808-809.) The Court conducted an exhaustive review of the legislative history of the statutory scheme surrounding sections 128.5 and 128.7, which will not be repeated. Suffice it to say that the Court concluded unequivocally that section "128.5(a) does not authorize trial courts to impose sanctions for any form of litigation misconduct arising 'from a complaint filed, or a proceeding initiated' after December 31, 1994." (*Id.* at p. 819.)

In 1994, the Legislature departed from the approach of section 128.5 and followed the Federal sanctions model instead, simultaneously enacting sections 128.6 and 128.7. (*Olmstead, supra*, 32 Cal.4th at p. 810.) Section 128.7, modeled on rule 11 of the Federal Rules of Civil Procedure, establishes requirements for every "pleading, petition, written notice of motion, or other similar paper" presented to a court. (§ 128.7, subd. (a).) Under that statute, documents presented to the trial court must be signed by an attorney or an unrepresented party certifying it has not been presented for an improper purpose, and contains no allegations or factual or legal contentions, claims or defenses that lack colorable support. (§ 128.7. subd. (b)(1)-(4).) Section 128.7 has a "safe harbor" provision. To deter future misconduct, the statute authorizes courts to award monetary sanctions, including reasonable expenses and attorney's fees, in appropriate cases, but only after the alleged violator has been given notice of the violation and a time-limited opportunity to correct or withdraw the challenged document. (§ 128.7, subds. (c)(1), (d).) Section 128.7 applies to all pleadings, motions or other covered documents filed on or after January 1, 1995. (§ 128.7, subd. (i).) Unless extended again, section 128.7 will automatically expire in January 2006. (§ 128.7, subd. (j).) Section 128.6, a virtual

duplicate of section 128.5, has never been operative and will take effect only in the event section 128.7 is repealed.[2] (§ 128.6, subd. (f).)

In *Olmstead*, the Supreme Court concluded that section 128.7 replaced section 128.5 entirely, and will continue to do so until at least January 2006. Although section 128.5 continues to apply to all litigation misconduct in the dwindling number of cases filed before 1995, only the narrower statute, section 128.7, may be invoked to obtain sanctions in all cases filed after that date. (*Olmstead, supra*, 32 Cal.4th at p. 815.)

Respondents acknowledge that, because this case involved sanctionable conduct occurring in front of a jury, not the presentation of documents for an improper purpose, they did not comply with – indeed could not have complied with – section 128.7's "safe harbor" notice provisions, a necessary prerequisite to obtaining sanctions under that statute. Still, they insist we affirm the court's ruling because, if we do not, the abusive misconduct at issue, which is unrelated to any pleading or motion, will go unpunished.

This precise argument was raised – and rejected – in *Olmstead*. Noting that the Legislature's goal in enacting section 128.5 in the first place was to broaden trial courts' authority to punish litigation abuses, the defendants argued it was "absurd" to read section 128.5 in a manner which limited courts' ability to sanction all litigation abuses, thereby undercutting its purpose. (*Olmstead, supra*, 32 Cal.4th at p. 818.) The Supreme Court disagreed, noting that defendants' "assertion of 'absurdity' proceed[ed] from the flawed premise that, once having enacted a broader sanction scheme, the Legislature could not rationally substitute a narrower one." (*Ibid.*) The legislative history makes it clear the Legislature was aware its shift from the sanctions scheme of section 128.5 to that of 128.7 would leave certain types of litigation misconduct unpunished. (See *Olmstead, supra*, 32 Cal.4th at p. 816 [Referring to legislative analyses objecting to a 1998 version of section 128.7 "because it did not 'permit sanctions . . . for frivolous

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[2] Section 128.6 mirrors section 128.5 exactly, except its definition of sanctionable "actions or tactics" is not limited to conduct stemming from an action filed before 1995. (Compare § 128.6, subd. (b)(1) and § 128.5, subd. (b)(1).)

conduct as well as filings,' . . . . [But] . . . conclud[ing] that the bill 'still appears to accomplish the laudable objective of deterring frivolous lawsuits and filings without the inclusion of sanctions for conduct or tactics outside the scope of section 128.7.'" (Emphasis deleted.)].) However, as the Supreme Court said, "there are other ways to sanction litigation abuses, and the Legislature's policy choice [was] well within the range of rational lawmaking." (*Id.* at p. 818.) Indeed one of those "other" sanctions was employed in this action when the trial court granted respondents' request for a mistrial, based upon the very misconduct for which the City was later ordered also to pay monetary sanctions.

Respondents insist it would be "grossly unjust" to apply *Olmstead* retroactively to this case because, in preparation for filing their sanctions motion, their attorneys devoted considerable efforts to researching case law and the application of sections 128.5 and 128.7. Based on that research, respondents concluded the First District's 2002 opinion in *Olmstead* (previously published at 104 Cal.App.4th 858) represented their best chance of success. Respondents' gamble has not paid off.

The appellate court's conclusion in *Olmstead* was not the law before, at the time of or after respondents filed their motion for sanctions. First, the Supreme Court had granted review and depublished the opinion on which respondents relied in April 2003, two months before respondents' sanctions motion was filed. (See *Olmstead v. Arthur J. Gallagher & Co.* (April 16, 2003) 132 Cal.Rptr.2d 536 [Granting plaintiffs' petition and limiting issues for review].) In violation of a fundamental rule of civil procedure, respondents unjustifiably sought sanctions based on the logic and result of a depublished opinion.[3] Second, as noted by the Supreme Court, the appellate opinion in *Olmstead* was the sole case in which any court had concluded section 128.5 could provide a basis for a

[3] Interestingly, despite their professed reliance on it, respondents' memorandum of points and authorities in support of the sanctions motion did not refer the trial court to the court of appeal's then-depublished opinion, either as authority for respondents' arguments, nor did respondents alert the trial court to the tenuous status of the appellate court's rationale.

sanctions award in a post-1994 case: "Between 1998 and 2002, other appellate courts stated in dicta that section 128.7 'replaced' section 128.5. [Citations.] . . . . [¶] In fact, prior to the Court of Appeal's decision in this case, every appellate court to consider the relationship between sections 128.5 and 128.7 concluded that section 128.7 'suspended' or 'replaced' section 128.5." (*Olmstead, supra,* 32 Cal.4th at p. 816.)

Olmstead governs this appeal. The trial court's order awarding sanctions under section 128.5 must be reversed.[4]

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[4] In light of our conclusion no statute supports a sanctions award, it is not necessary that we address the parties' arguments as to whether the "orders" prohibiting counsel from making certain statements were ever, in fact, made. Nevertheless, two comments on that point are in order.

First, without question, the severe sanction of a mistrial was warranted. Pulone's comments – particularly the gratuitous and potentially inflammatory remark about Pedro Anaya's deportation – were entirely inappropriate and clearly violated the terms and spirit of the trial court's pre-trial rulings. Any questions that the City's attorney had about the terms or scope of the court's evidentiary ruling, or about the trial court's intent to clarify that Vides' parents, not the children, received a settlement, would have been quickly dispelled by a sidebar conference

Second, a mistrial might well have been avoided had the trial court simply issued specific, written rulings on the parties' pre-trial and *in limine* motions.

We are aware that trial courts are frequently barraged by stacks of *in limine* and other pre-trial motions, just as a trial is scheduled to begin. We also understand many of those motions are brought, not with the expectation they will be resolved on the merits, but to preserve the record for appeal, or to alert the judge to an important issue a party expects will arise during trial. In many such cases, an oral ruling on the record is sufficient.

However, in a case such as this, in which, the City's *in limine* motion regarding the helicopter crash was argued vigorously and extensively by both sides, was denied, and then was reasserted in an equally hard-fought pre-trial motion for reconsideration, a specific written ruling was in order. In light of the parties' pre-trial battle on the issue, the trial court's oral ruling to exclude evidence of the helicopter crash, and its arguably contradictory oral agreement to "instruct that there was a helicopter crash and those who had claims relating to it sued and got a big settlement," if Vides' sisters testified they never saw their sister again, contributed to a climate of confusion, of which Pulone took advantage. A written order, clearly setting forth the trial court's pre-trial ruling, would have denied him that opportunity.

DISPOSITION

The order awarding sanctions is reversed, and the matter remanded with instructions to the trial court to enter an order denying respondents' motion for sanctions under section 128.5. Each party shall bear its own costs on appeal.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.